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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, A. D. 1941.

No. 706

CITY OF CHICAGO, a Municipal Corporation, BOARD  
OF HEALTH OF THE CITY OF CHICAGO, DR.  
ROBERT A. BLACK, Health Commissioner and Acting  
President of Board of Health of the City of Chicago,  
*Petitioners,*

vs.

FIELDCREST DAIRIES, INC.,

*Respondent.*

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT AND BRIEF IN SUP-  
PORT OF PETITION.**

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CITY OF CHICAGO, a Municipal Corporation, BOARD  
OF HEALTH OF THE CITY OF CHICAGO, DR.  
ROBERT A. BLACK, Health Commissioner and Acting  
President of Board of Health of the City of Chicago,  
*Petitioners,*

vs.

FIELDCREST DAIRIES, INC.,

*Respondent.*

---

**PETITION FOR WRIT OF CERTIORARI.**

---

*To the Honorable, the Chief Justice and Associate Justices  
of the Supreme Court of the United States:*

The petition of City of Chicago, a municipal corporation,  
Board of Health of the City of Chicago, Dr. Robert A.  
Black, Health Commissioner and Acting President of  
Board of Health of the City of Chicago, respectfully  
shows:

**Statement of the Matter Involved.**

The particular matter involved is a provision in the milk  
ordinance of the City of Chicago requiring milk to be

delivered in "standard milk bottles."\* The Circuit Court of Appeals for the Seventh Circuit has held that this provision of the ordinance is void (R. 1794). A writ of certiorari is sought to review the holding.

The respondent, Fieldcrest Dairies, Inc. (plaintiff in the trial court), a Michigan corporation incorporated in 1937 (R. 844, 1609-12), filed suit on February 2, 1939 against the petitioners (defendants) in the United States District Court for the Northern District of Illinois, Eastern Division. The plaintiff had sought a permit from the defendant Board of Health to sell milk in "Pure-Pak" paper containers in Chicago; the permit had been denied. The complaint (R. 2-15) alleged that the plaintiff's containers are "sterile, sanitary, and made of non-absorbent material" and are "standard milk bottles" within the terms of the Chicago ordinance requiring milk to be delivered in "standard milk bottles." The action of the defendants in refusing the permit to sell milk in Pure-Pak containers in Chicago was alleged to be discriminatory and unreasonable, to deprive the plaintiff of the equal protection of the laws, and to deprive the plaintiff of its property without due process of law, all in violation of the federal and Illinois constitutions. The complaint prayed (R. 14-15) for (1) a declaratory judgment finding either that the ordinance does not prohibit the plaintiff from selling milk products in Pure-Pak containers or that, if it does, the ordinance is unreasonable and unconstitutional; and for (2) an injunction restraining the defendants from interfering with the plaintiff in selling milk products in Pure-Pak containers in the city. The defendants filed an answer (R. 16-22) which denied that the plaintiff's containers are standard milk

\* The provision is contained in the third sentence of section 3094 of the ordinance: "Any milk or milk products sold in quantities of less than one gallon shall be delivered in standard milk bottles; . . ." (R. 108).

bottles, are non-absorbent or sterile, or are sanitary containers for the distribution of milk, and denied that the plaintiff is entitled to the relief sought. The case was referred to a master in chancery for hearing (R. 123).

• While the case was being tried before the master, a new issue arose as to the power of the city to regulate the character of containers used for the distribution of milk within the city. Municipalities in Illinois had been given broad regulatory powers over the production, processing, and distribution of milk by certain provisions of the Illinois Cities and Villages Act of 1872 (Public Laws of Illinois, 1871-72, pp. 231-233, secs. 1, 50, 53, 66, 78), which have not been repealed (Ill. Rev. Stat. 1939, ch. 24, secs. 65, 65.49, 65.52, 65.65, and 65.77). On July 1, 1939 the so-called Milk Plant Pasteurization Act went into effect (Laws of Illinois, 1939, pp. 660-666; Ill. Rev. Stat. 1939, ch. 56½, secs. 115-134). By this 1939 statute the Illinois General Assembly imposes many sanitary regulations on the milk industry, including a requirement that single-service (i.e. paper) milk containers be made and transported in a sanitary manner, and authorizes the Director of the Department of Public Health to promulgate minimum requirements for interpretation and enforcement of the act. Section 19 of the act contains a saving clause reading as follows:

“Nothing in this act shall impair or abridge the power of any city, village or incorporated town to regulate the handling, processing, labeling, sale or distribution of pasteurized milk, and pasteurized milk products, provided such regulation not permit any person to violate any of the provisions of this act.” (Ill. Rev. Stat. 1939, ch. 56½, sec. 133.)

The plaintiff placed reliance on this statute in the presentation of the case to the master (see master's report, R. 1732).

The master heard many witnesses, who testified (R. 132-1396), about the manufacture of paper milk containers, their sanitary and insanitary characteristics, their use and regulation outside of Chicago, and the use of glass milk bottles in Chicago. Many exhibits were admitted in evidence (R. 1397-1708). The master filed a comprehensive report (R. 1710-36), recommending the denial of the relief sought. His conclusions were that paper milk containers are not "standard milk bottles" and are forbidden by the Chicago ordinance; that the saving clause in the Milk Plant Pasteurization Act of 1939 preserved the pre-existing home rule of municipalities on the subject of the regulation of milk; and that the ordinance is valid. On the question of the reasonableness of the ordinance the master discussed the evidence in detail (R. 1718-31), made specific findings of fact (R. 1734-35), and found from the testimony of the plaintiff's witnesses that the sanitary characteristics of paper milk containers are such that the Chicago City Council may reasonably have decided that their prohibition was necessary to protect the purity and wholesomeness of milk (R. 1734).

The trial court sustained objections (R. 1738-49) to the master's report and rendered a decree (R. 1759-61) in favor of the plaintiff. The decree contained a declaratory judgment that the plaintiff's paper milk containers are standard milk bottles. It also enjoined the defendants from interfering with the sale and delivery by the plaintiff of milk in the City of Chicago in the plaintiff's Pure-Pak containers. The opinion of the trial court (R. 1752-56), while devoted chiefly to the proposition that the plaintiff's paper milk containers are standard milk bottles and are not forbidden by the ordinance, also stated that under the 1939 statute (the Milk Plant Pasteurization Act) the City of Chicago was "without power to prohibit the use of

single-service containers if such containers conformed to the provisions of the statute." And the opinion stated that the ordinance would be void if it were construed to forbid the use of paper containers; by this the court meant, as indicated by its findings of fact (R. 1756-58), that the ordinance would be "unreasonable and discriminatory and without any reasonable basis" if it forbade the use of paper milk containers.

On appeal by the defendants to the Circuit Court of Appeals, the opinion (R. 1782-94) was written by Major, Circuit Judge, joined in by Sparks, Circuit Judge, with Lindley, District Judge, dissenting in part (R. 1795-96). The Circuit Court of Appeals held (opinion, R. 1784-88) that the trial court erred in holding that the ordinance permitted the use of paper milk containers and approved the master's conclusion that the plaintiff's paper containers are not "standard milk bottles." Judge Lindley did not dissent from this portion of the opinion.

The majority opinion stated (R. 1790-93) that the ordinance was void because contrary to the public policy of the State of Illinois as expressed in the Milk Plant Pasteurization Act of 1939. After pointing out that this statute permits the use of single-service containers and that the plaintiff had obtained a state certificate of approval of its pasteurization plant, the opinion said that the right thus conferred by the state was denied to it by the city ordinance. The opinion also said:

"... the state, upon entering the field not only made provision for the sale and distribution of pasteurized milk but recognized, permitted and approved the use of such containers (single-service or paper milk containers), and the ordinance is squarely in conflict therewith." (R. 1793.)

As for the saving clause in the statute (sec. 19 quoted above), the majority opinion stated that it granted the city "the power to regulate paper containers . . . but we are unable to accept the theory that it has authority to outlaw that which the state has legalized." The majority opinion said also (R. 1794) that there was no occasion "to discuss at length or decide" other questions about the validity of the ordinance. Nevertheless the opinion continued with a brief discussion of factors in the case that were said to rebut the presumption of the validity of the ordinance when attacked on constitutional grounds. The majority opinion concluded that the plaintiff was entitled (a) to a declaratory judgment that the ordinance was void in prohibiting the use of the plaintiff's paper containers and (b) to an injunction "restraining the defendants from prohibiting, but not from regulating, the use of such containers" (R. 1794).

In his dissenting opinion Judge Lindley (R. 1795-96) stated that the ordinance should be sustained, that he was unable to agree that the ordinance violated the public policy of the State of Illinois as expressed in the 1939 statute. He said that the language of the saving clause "was not meaningless or surplusage as announced in the majority opinion, but rather in the nature of a declaratory clause maintaining the existing status . . . to assure municipalities that their power to act in the premises was not taken away . . .".

Pursuant to the majority opinion a judgment was entered by the Circuit Court of Appeals, reversing the cause and remanding it for the sole purpose of modifying the decree to conform with the views expressed in the opinion (R. 1797). This is the judgment sought to be reviewed. It requires modifications in the decree of the trial court

as follows; while the decree contained a declaratory judgment that the plaintiff's paper containers are standard milk bottles and are permitted by the Chicago ordinance, the modified declaration will be that the ordinance is invalid in prohibiting the use of the plaintiff's containers; and while the decree enjoined the defendants "from in any manner or by any means preventing or in anywise interfering" with the sale and delivery of milk by the plaintiff in its paper milk containers, the injunction ordered by the Circuit Court of Appeals will restrain the defendants from prohibiting, but not from regulating, the use of the plaintiff's containers.

### **Basis of the Jurisdiction of This Court.**

(a) The jurisdiction of this court is invoked under section 240 of the Judicial Code as amended by the act of February 3, 1925 [28 U. S. C. 347, par. (a)]: The pertinent language of the section is as follows:

"(a) In any case . . . in a circuit court of appeals, . . . it shall be competent for the Supreme Court of the United States . . . to require by certiorari, *either before or after a judgment or decree, by such lower court*, that the cause be certified to the Supreme Court for determination by it, and with like effect, as if the cause had been brought there by unrestricted appeal." (Italics added.)

In a sense the judgment of the Circuit Court of Appeals sought to be reviewed may not be a final judgment, since it reversed and remanded the cause for the purpose of modifying the decree entered by the trial court to conform with the views expressed in the opinion. But the Circuit Court of Appeals made a final determination that the ordinance involved is invalid and the formal modification of the decree is all that remains to be done in the trial court.

This alone is enough to permit the Supreme Court to review the cause by writ of certiorari, particularly since the judgment need not be final in the technical sense. This is evident from the language of the section quoted above. And see *Fuller v. Otis Elevator Company*, 245 U. S. 489 (1917), where the fact that the judgment was not final was held to be no objection to the granting of the writ.

(b) The judgment of the Circuit Court of Appeals sought to be reviewed was entered on August 4, 1941 (R. 1797).

### Questions Presented.

There are two questions presented. Both require the application of federal and state law.

(1) The Circuit Court of Appeals has held that the City of Chicago did not have power to enact the ordinance forbidding the use of paper milk containers. This holding involves the construction of grants of regulatory powers made by the Illinois state legislature to the City of Chicago. The state law aspect of this question is: did the Illinois Milk Pasteurization Act of 1939 withdraw from the City of Chicago the power to enact the ordinance granted to the city by the Illinois Cities and Villages Act of 1872? In holding the ordinance invalid the Circuit Court of Appeals was exercising the jurisdiction of a federal court to grant writs of injunction and to enter declaratory judgments in diversity of citizenship cases. There is thus a federal question presented: should the Circuit Court of Appeals have exercised this jurisdiction to deny the city the power to enact the ordinance and thus to interfere with a local, state matter?

(2) The complaint alleged (R. 11) that the ordinance deprived the plaintiff of the equal protection of the laws

and of its property without due process of law in violation of both the federal constitution (fourteenth amendment) and the Illinois constitution (sections 2 and 13 of article 2). The trial court found that the ordinance would be unreasonable and discriminatory if it forbade the use of paper milk containers. It was not necessary for the Circuit Court of Appeals to decide this constitutional question; since it held that the city had been deprived of the power to pass the ordinance. Nevertheless the majority opinion of the Circuit Court of Appeals sets forth a number of grounds for holding the ordinance unreasonable, indicating that the majority considered the ordinance unconstitutional (R. 1794). There is here a question of the propriety of a judicial pronouncement that a city regulation is invalid under the fourteenth amendment when there is evidence in the record showing that the ordinance was not unreasonable. If this court should decide that the city has power to forbid the use of paper milk containers, the decision of the constitutional question cannot be avoided. On this issue the specific question, under both the federal and Illinois constitutions, is whether or not the plaintiff has proved that the ordinance, in forbidding the use of paper milk containers, is so palpably unreasonable as to be arbitrary or capricious, so that the provision bears no reasonable relation to the protection of the public health.

#### **Reasons for Allowance of the Writ.**

(1) In holding that the ordinance is void because the 1939 state statute deprived the city of the power to forbid the use of paper milk containers, the Circuit Court of Appeals has decided an important question of local law in a way clearly in conflict with the local law.

The holding of the Circuit Court of Appeals did not follow the controlling statute. Before 1939 the city had power to forbid the use of paper milk containers. The power was granted to the city in the Illinois Cities and Villages Act of 1872 which the Illinois courts construed as giving Illinois cities broad regulatory powers over the milk industry [*Koy v. City of Chicago*, 263 Ill. 122, 130-1 (1914)]. This was not denied in the majority opinion. But a 1939 statute which regulates the use of paper milk containers was said in the opinion to have withdrawn some of the city's power, so that the ordinance forbidding the use of paper milk containers conflicts with what was held to be a state public policy expressed in the statute. The saving clause in the 1939 statute (section 19) provided expressly that nothing in the act should "impair or abridge" the power of any city. In holding that some of the city's power was withdrawn by reason of provisions in the statute, the Circuit Court of Appeals held that the statute did "impair or abridge" the power of cities. It thus failed to follow the plain and unambiguous language of the saving clause in the statute, as noted in the dissenting opinion, although the question of the city's power is determined by construing the statutory grant of power. The holding is thus in conflict with the controlling local law.

The Illinois courts have not construed the 1939 statute. Yet there is no Illinois case that, in construing a legislative grant of municipal power, disregards the plain language of the grant, as did the holding here. The most pertinent Illinois case is *City of Ottawa v. Brown*, 372 Ill. 468 (1939). The Illinois Supreme Court, in considering the effect on a city's power of state regulations of the oil industry, there gave a broad interpretation to a saving clause less emphatic than the one involved here. The hold-

ing of the Circuit Court of Appeals conflicts with the *City of Ottawa* case, which was not mentioned in the opinion.

The holding of the Circuit Court of Appeals also violates settled rules of statutory construction. The intention of the legislature was drawn from isolated provisions of the 1939 statute rather than from the entire act. And language of the statute (the saving clause) was considered surplusage, although it is possible to give it effect.

From the language of the saving clause and the holding in the *City of Ottawa* case, it is clear that the Illinois Supreme Court would not have decided, as did the Circuit Court of Appeals, that the 1939 statute withdrew the city's power under the 1872 statute to enact the ordinance. The question is a peculiarly local one, controlled even before the decision in *Erie R. Co. v. Tompkins*, 304 U. S. 64 (1938), by the decisions of the local state courts.

The holding of the Circuit Court of Appeals is particularly erroneous in that it interferes with a local, state matter. The Circuit Court of Appeals has taken it upon itself to decide where the line limiting municipal power should be drawn, even though the Illinois legislature has itself drawn the line. If there is a doubt as to where the legislature drew the line, the Illinois courts will have the last word on the question. In interfering with the enforcement of a state law by the extraordinary remedy of a federal writ of injunction, the holding of the Circuit Court of Appeals conflicts with the decisions of this court in *Hawks v. Hamill*, 288 U. S. 52 (1933), and in *Railroad Commission of Texas v. Pullman Company*, 312 U. S. 496 (1941). For similar reasons the Circuit Court of Appeals should have refused in its discretion to enter a declaratory judgment that the city had been deprived of its power to enact the ordinance. Thus, if there were any doubt about

the power of the city, the Circuit Court of Appeals should have refused to decide the question. But the power of the city to enact the ordinance is so clear from the controlling statute and decisions of the state that the Circuit Court of Appeals should have determined without difficulty that the city had the power.

This local question is of great importance. The ruling adverse to the defendants means that an ordinance enacted by a legislative body representing more than 3,500,000 people is invalid. But the effect of the ruling is even more far-reaching. The holding that the 1939 Illinois statute has abridged and impaired the regulatory powers of cities over the milk industry, although the saving clause in the statute expressly provides to the contrary, deprives *all cities and villages in Illinois* of effective regulatory powers over the milk industry. And in nullifying the saving clause the holding casts doubt on the powers of cities and villages in Illinois to regulate other local matters which the state has begun to regulate.

(2) The holding of the trial court and the dictum of the Circuit Court of Appeals that the ordinance is an unreasonable exercise of the police power conflict with a long line of decisions of this court. The primary purpose of the ordinance in forbidding the use of paper milk containers is the protection of public health. The master, before whom the witnesses testified in extensive hearings, described in detail the sanitary characteristics of paper milk containers (R. 1718-29) and made specific findings that the City Council may reasonably have based its decision on evidence tending to prove that there are health hazards in the use of paper milk containers (R. 1734-35). The majority opinion of the Circuit Court of Appeals admitted that the record discloses "some evidence" that the use of paper

milk containers presents a hazard to health. (R. 1794). The wisdom and propriety of forbidding the use of paper milk containers are matters for the determination of the legislative body. The conclusions of the trial court and the Circuit Court of Appeals that the ordinance is unreasonable were based upon factors that are not controlling under the applicable principles of constitutional law.

Cases establishing that the ordinance was not unreasonable are discussed in the attached brief. We note here briefly that regulations of the milk industry have been upheld by this court [*Nebbia v. New York*, 291 U. S. 502 (1933); *Adams v. Milwaukee*, 228 U. S. 572 (1911)] as well as regulations of containers [*Pacific States Box and Basket Co. v. White*, 296 U. S. 176 (1935)]. There are similar holdings by the Illinois Supreme Court [*Koy v. City of Chicago*, 263 Ill. 122 (1914) and cases there cited].

It is submitted that these reasons, which are discussed in greater detail in the attached brief, call for the exercise of this court's power of review.

#### **Prayer of Petition.**

Wherefore the petitioners respectfully pray: that a writ of certiorari be issued out of and under the seal of this court commanding the United States Circuit Court of Appeals for the Seventh Circuit to certify and send to this court for its review and determination a complete transcript of the record in the case numbered on its docket as No. 7502 and entitled Fieldcrest Dairies, Inc., Plaintiff-Appellee, vs. City of Chicago, a municipal corporation, Board of Health of the City of Chicago, Dr. Robert A. Black, Health Commissioner and Acting President of Board of Health of the City of Chicago, Defendants-Appellants; that the judgment of the Circuit Court of Appeals may be

reversed by this court; and that the petitioners may have such other and further relief as seems just.

City of Chicago, a municipal corporation,

Board of Health of the City of Chicago,

Dr. Robert A. Black, Health Commissioner and Acting President of Board of Health of the City of Chicago,

*Petitioners.*

By BARNET HODES,

*Corporation Counsel of the City of Chicago,*

511 City Hall, Chicago, Illinois.

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JAMES A. VELDE,

*Assistant Corporation Counsel,*

WALTER V. SCHAEFER,

*Of Counsel.*

IN THE  
**Supreme Court of the United States**

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CITY OF CHICAGO, a Municipal Corporation, BOARD  
OF HEALTH OF THE CITY OF CHICAGO, DR.  
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President of Board of Health of the City of Chicago,  
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vs.

FIELDCREST DAIRIES, INC.,  
*Respondent.*

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**BRIEF IN SUPPORT OF PETITION FOR WRIT OF  
CERTIORARI.**

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**Index.**

An index to this brief with table of authorities cited appears on the pages preceding the petition, *supra*.

**Opinions of the courts below.**

The majority and dissenting opinions of the Circuit Court of Appeals (R. 1782-1796) are reported in 122 F. 2d 132 (1941); the opinion of the District Court (R. 1752-1756) is reported in 35 F. Supp. 451 (1940).

### **Statement of jurisdiction.**

A statement of the grounds on which the jurisdiction of this court is invoked appears in the petition, *supra*, pp. 7-8, under the heading, "Basis of Jurisdiction of This Court".

### **Statement of the case.**

A statement of the case appears in the petition, *supra*, pp. 1-7 under the heading, "Statement of the Matter Involved".

### **Specification of errors.**

(1) The Circuit Court of Appeals erred in holding the provision of the Chicago ordinance to be in conflict with the public policy of the State of Illinois.

(2) The Circuit Court of Appeals erred in directing the issuance of an injunction and declaratory judgment in favor of the plaintiff.

(3) The Circuit Court of Appeals erred in not reversing the finding of the trial court that the ordinance is unreasonable and unconstitutional if it forbids the use of paper milk containers.

(4) The Circuit Court of Appeals erred in not holding that the judgment of the trial court should be reversed and a decree entered in accordance with the findings in the master's report.

## Summary of Argument.

### *I. The Illinois Milk Pasteurization Plant Act of 1939 did not deprive the city of power to pass the ordinance.*

The Illinois Cities and Villages Act of 1872 as construed by the Illinois courts granted power to the city to forbid the use of paper milk containers. The power was not impaired by the Milk Pasteurization Plant Law of 1939. This is clear from an analysis of the language and a consideration of the purpose of the saving clause in the statute. The Circuit Court of Appeals' construction of the 1939 statute disregards the plain language of the saving clause and violates elementary rules of statutory construction. The Illinois Supreme Court would not have decided the case as did the Circuit Court of Appeals. The decision of the Circuit Court of Appeals cuts down the power of all cities and villages in Illinois to make effective sanitary regulations of the milk industry. This court should review and decide on the merits the question of the city's power.

### *II. The ordinance is not invalid on constitutional grounds.*

(a) The principles governing the validity of the ordinance under the due process clauses of the federal and Illinois constitutions are well settled. Debatable questions as to the reasonableness of the ordinance are for the legislative body and not the courts to determine. The courts may declare health legislation invalid only if palpably arbitrary or capricious. Regulations of containers and many regulations of the milk industry have been sustained.

(b) Evidence in the record shows that to forbid the use of paper containers for delivering milk is not unreasonable. The master found that there were possible public

health hazards in the use of paper milk containers. The Circuit Court of Appeals admitted that there was evidence in the record that their use presents a hazard to health. The presumption of validity of the ordinance is as strong as when the ordinance was enacted. The use of paper milk containers elsewhere, their regulation by the State of Illinois and in the model ordinance of the United States Public Health Service, the use of paper containers for other purposes, and the proposal by the Chicago Board of Health that the City Council permit their use for delivering milk are factors that are immaterial both in fact and in law. The prohibition of the use of paper milk containers is not so unrelated to any possible danger to the public health as to be considered an arbitrary interference with property rights.

## ARGUMENT.

### I.

**The Illinois Milk Pasteurization Plant Act of 1939 did not deprive the city of power to pass the ordinance.**

A question of construction of Illinois statutes is presented. The Circuit Court of Appeals held the ordinance invalid on the ground that it is contrary to the public policy of the state as found in an Illinois statute, the so-called Milk Pasteurization Plant Law of 1939 (Laws of Illinois, 1939, pp. 660-666; Ill. Rev. Stat. 1939, ch. 56½, secs. 115-134). Illinois cities derive their powers from the state legislature and have only such powers as have been delegated to them by the legislature. *City of Chicago v. Murphy*, 313 Ill. 98, 101 (1924). Consequently the acts of the Illinois General Assembly must be looked to for the existence and extent of any power assumed to be exercised by a city.

There is no constitutional objection to regulation of the same subject by statute and by ordinance. In *City of Chicago v. Union Ice Cream Co.*, 252 Ill. 311 (1911), the court said (p. 314):

“ . . . The great weight of authority is to the effect that the legislature may confer police power upon a municipality *over subjects within the provisions of existing State laws*. An act may be a penal offense under the laws of the State, and further penalties, under proper legislative authority, may be imposed for its commission by municipal ordinances. The enforcement of one would not preclude the enforcement of the other. (Citing authorities.) Municipal corporations are bodies politic, vested with many political and legislative powers for local government and police regula-

tions, established to aid the government by the State. The necessity for their organization may be found in the density of the population and the conditions incidental thereto. *Because of this, the municipal government should have power to make further and more definite regulations than are usually provided by general legislation and to enforce them by appropriate penalties.*" (Italics added.)

### **Power of Cities under the 1872 Act.**

As originally enacted in 1872, article 5 of the Illinois Cities and Villages Act contained the following provisions:

"Section 1. The city council in cities, and the president and the board of trustees in villages, shall have the following powers:

"Section 50. To regulate the sale of meats, poultry, fish, butter, cheese, lard, vegetables, and all other provisions, and to provide for place and manner of selling the same.

"Section 53. To provide for and regulate the inspection of meats, poultry, fish, butter, cheese, lard, vegetables, cotton, tobacco, flour, meal and other provisions.

"Section 66. To regulate the police of the city or village and pass and enforce all necessary police ordinances.

"Section 78. To do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease." (Public Laws of Illinois, 1871-72, pp. 231-233.)

Except for minor amendments not material here, there have been no changes in these provisions. (Sections 65, 65.49, 65.52, 65.65 and 65.77, ch. 24, Ill. Rev. Stat. 1939.)

These provisions have been interpreted by the Illinois Supreme Court to grant cities "very broad regulatory

powers over the milk industry. A leading case is *Koy v. City of Chicago*, 263 Ill. 122 (1914), where the court held valid an ordinance requiring the use of a certain apparatus for the recording of temperatures during the pasteurization of milk. The court said (p. 127) of the above-quoted sections of the Cities and Villages Act:

“The regulation of the sale of milk and its products is essential to the preservation of the public health, and authority for its regulations is clearly given to the city council by paragraphs 50, 53, 66 and 78 of section 1 of article 5 of the Cities and Villages act. (Citing cases)

A more detailed statement of the power of the city under the statute was also made (pp. 130-131):

“\* \* \* There is no article of food in more general use than milk; none whose impurity or unwholesomeness may more quickly, more widely and more seriously affect the health of those who use it. The regulation of its sale is an imperative duty which has been universally recognized. This regulation in minute detail is essential, and extends from the health and keeping of the cows which produce the milk, through all the processes of transportation, preservation and delivery to the consumer. Not only may laws and ordinances require that milk offered for sale shall be pure, wholesome and free from the bacilli of any disease, but they may and do, in order to produce this result, prescribe the manner in which such purity, wholesomeness and freedom from disease shall be secured and made to appear. The cows may be required to be registered with a designated public authority; the dairies to be conducted and managed according to prescribed regulations, and, together with the dairy utensils, subjected to inspection; the receptacles in which milk is contained to be of prescribed character and capacity; the labels to be placed according to fixed regulations and to contain certain required information; the milk to be prepared in the manner, at the

times and by the means directed and at all times to be subject to inspection. These may be drastic restrictions upon a private business, but experience and the increasing knowledge of the causes of disease and the agencies of its propagation have demonstrated the necessity of such restrictions to the preservation of the public health. The object of all such restrictions is the preservation of the public health, and as a means to that end the protection of the general public against dishonest vendors of milk. They all impose inconveniences and expense upon the dealers in milk, but they are not on that account unreasonable, unjust or oppressive. Legislatures and city councils, in the exercise of the police power, may prohibit all things hurtful to the health and safety of society even though the prohibition invade the right of liberty or property of an individual."

The power of Illinois cities to regulate every detail of the milk industry is here said to extend to requiring "the receptacles in which milk is contained to be of prescribed character and capacity." Before the *Koy* case the state Supreme Court in *City of Chicago v. Bowman Dairy Co.*, 234 Ill. 294 (1908), had held valid an ordinance requiring milk bottles to contain a permanent indication of their capacity.

These broad regulatory powers over the milk industry were possessed by the City of Chicago when it passed a comprehensive milk ordinance on January 4, 1935 (R. 23-112). The ordinance contains regulations of many aspects of the production and distribution of milk. Included was the particular provision involved in this case:

"Any milk or milk products sold in quantities of less than one gallon shall be delivered in standard milk bottles." (R. 108.)

This language required the use of the familiar glass milk containers. (So held the Circuit Court of Appeals in this

case, R. 1788, the construction of the ordinance being one of the issues litigated in the lower courts.)

The language of the *Koy* case that a city has power under the Cities and Villages Act to require a milk receptacle to be of prescribed character shows clearly that the City of Chicago had power to require milk to be delivered in standard milk bottles, even though the use of a receptacle that was not a standard milk bottle—such as a paper container—was prohibited. So also other devices of the dairy industry that did not meet the requirements of the ordinance were prohibited. Necessarily a regulation that prescribes a standard forbids what does not meet the standard. This was pointed out by the Illinois Supreme Court in *Haggengos v. City of Chicago*, 336 Ill. 573 (1929), where an ordinance that prohibited parking automobiles on streets during certain hours of the day was attacked on the ground that the power to regulate the use of streets did not include the power to prohibit. Of the relative terms “regulate” and “prohibit” the Illinois Supreme Court said (pp. 576-577):

“It has been said often that the power to regulate does not include the power to prohibit; and this is true in the sense that mere regulation is not the same as absolute prohibition. Regulation of business or action implies the continuance of such business or action, while prohibition implies its cessation. On the other hand, *the power to regulate implies the power to prohibit except upon the observation of authorized regulation.* The ordinance does not prohibit the standing of vehicles on all streets throughout the city or at all times, but only on some streets at some times.”  
(Italics added)

The power to regulate the milk industry and milk containers thus included the power to require a prescribed container, and this power included in turn the power to forbid

the use of a container that did not meet the requirements imposed. Under the 1872 statute the City of Chicago thus had power to forbid the use of paper milk containers and to enact the ordinance so providing.

### **Effect of the 1939 statute on the power of cities.**

The title of the Milk Pasteurization Plant Law of 1939 is as follows:

"An Act regulating the handling, processing, labeling, sale and distribution of pasteurized milk and pasteurized milk products." (Laws of Illinois, 1939, p. 660; Ill. Rev. Stat. 1939, ch. 56½, sec. 115.)

Sections 1 to 18 of the act contain numerous regulatory provisions, including a requirement in section 15, item 10, that "single service containers . . . shall be manufactured and transported in a sanitary manner". Section 19 is a saving clause. It is the contention of the defendants that this saving clause retains intact the regulatory powers of the city that existed before the enactment of the statute. Section 19 reads as follows:

"Nothing in this act shall impair or abridge the power of any city, village or incorporated town to regulate the handling, processing, labeling, sale or distribution of pasteurized milk and pasteurized milk products, provided that such regulation not permit any person to violate any of the provisions of this Act." (Ch. 56½, sec. 133, Ill. Rev. Stat. 1939.)

The meaning of this saving clause is the vital question on this branch of the case. The Circuit Court of Appeals holds that it did not prevent the impairment by the statute of some of the city's power. The defendants contend that its positive and unambiguous language has been disregarded by this holding.

It is not necessary to analyze the 1939 act in detail to see if it contains anything that is not covered by the terms of

the saving clause. The saving clause is in the language of the title of the act. The title describes the act as one regulating the "handling, processing, labeling, sale and distribution" of milk, and the saving clause states that nothing in the act shall impair the power of the city to regulate the "handling, processing, labeling, sale or distribution" of milk—the identical subjects named in the title. The Illinois constitution contains the common provision that an act may embrace only the subject expressed in the title (article 4, section 13, Illinois Constitution of 1870); and any subject in the act that is not embraced in the title is invalid. By using the language of the title in the clause that saves the power of cities and villages, the legislature thus necessarily saved to them their pre-existing power over the entire subject-matter covered by the act. The identity of the language in the saving clause with that in the title thus makes the saving clause as broad as it could possibly be made, so that, whatever aspects of the milk industry may be subjected to state-wide regulation by the statute, cities and villages retain to the fullest extent every power that they had theretofore. This identity of language alone indicates unmistakably that the saving clause preserved the city's power to forbid the use of paper milk containers. But the same result is reached by considering other aspects of the saving clause.

There is only one limitation in the saving clause on this complete retention of the power of cities: the proviso says that city regulation shall "not permit any person to violate any provisions" of the act. By expressing only one exception to the retention of power the legislature has indicated an intention that there is no other exception. This is a clear case for the application of the rule that the expression of one exception excludes other exceptions [see

*People v. Deep Rock Oil Corp.*, 343 Ill. 388, 401 (1931)].

The ordinance forbids the use of paper-milk containers and does not permit a violation of the act. Not being within the exception, the power of the city has been retained.

Only a cursory reading of the saving clause indicates an intention not to make any change whatever in the powers of cities to regulate the sale of milk, including the power to forbid the use of paper-milk containers. A detailed exposition of the language of the section leaves no possible doubt of this intention:

"*Nothing in this act . . .*". In spite of these self-explanatory words, the Circuit Court of Appeals finds *something* in the act that indicates a public policy affecting the powers of cities.

"*. . . shall impair or abridge . . .*". These words mean that the act was intended not to weaken or curtail the power which cities had before the act was passed. Yet the Circuit Court of Appeals holds squarely that the statute makes the city's power less than it was before.

"*. . . the power of any city, village or incorporated town . . .*". The power of cities to regulate milk was derived from the Illinois Cities and Villages Act of 1872 quoted above and interpreted by the Illinois Supreme Court in the *Koy* and other cases.

"*. . . to regulate . . .*". "To regulate" means "to control, govern, or direct by rule or regulation, to subject to guidance or restriction" (Oxford English Dictionary, *regulate*). "Regulate" was the very word used in the grant of power in the Illinois Cities and Villages Act of 1872 quoted above (cities were given power "to regulate the sale of . . . provisions", and to "*. . . make all regulations which may be necessary or expedient for the promo-*

tion of health or the suppression of diseases"). Under that act, as was stated in the *Koy* case, the power to regulate the milk industry included the power to prescribe the character of the receptacle in which milk is sold; and the power to regulate containers included the power to forbid the use of paper containers. The use of the same word "regulate" in the saving clause in the 1939 statute evidences an unmistakable legislative intention that cities may continue to forbid the use of paper containers.

"... *the handling, processing, labeling, sale and distribution of pasteurized milk and pasteurized milk products, . . .*" As we have noted, these words describe the field of regulation described in the title of the act. Clearly the words "sale and distribution" include the type of container in which the product is sold or distributed.

"... *provided such regulation not permit any person to violate any of the provisions of this act.*" As we have noted, this single limitation on the power of cities retained by the act indicates an intention that there are no other exceptions. A regulation that forbids the use of particular containers does not permit a violation of any state regulation. This would only be true of a regulation that permitted a type of container forbidden by the statute. The legislature's reason for inserting this proviso in the saving clause is apparent: the other language in the saving clause is so broad that, without the proviso, a city regulation might be valid even though it permitted a violation of the statute.

The purpose of the saving clause is clear. Within the confines of the State of Illinois are many urban and rural areas. Many municipalities are so small that their officers are unable to adopt and enforce adequate regulations of the milk industry. There may be a need for state regula-

tion of the milk industry in these small municipalities as well as in rural areas. Entirely different are the problems of regulation in a municipality like the City of Chicago, where the daily consumption of milk is about 1,300,000 quarts (R. 966) and there are about 140 dairies (R. 986). The necessity for municipal regulation that differs from state regulation is clearly recognized in *City of Chicago v. Union Ice Cream Co.*, 252 Ill. 311, 314 (1911), quoted above (pp. 19-20). It was this necessity that the legislature had in mind in stating in plain and unambiguous language that the power of cities and villages should remain intact.

**The Circuit Court of Appeals' construction of the 1939 statute.**

While the saving clause says that the 1939 statute shall not impair or abridge the city's power, the Circuit Court of Appeals holds that the city's power is less than it was before the statute was passed. The majority opinion of the Circuit Court of Appeals thus disregards the plain language of the statute. This was the view of the dissenting judge, who in his opinion said that the saving clause "was not meaningless or surplusage, as announced in the majority opinion" but was "in the nature of a declaratory clause maintaining the existing status, inserted by the legislature in an abundance of caution, to assure municipalities that their power to act in the premises was not taken away" (R. 1795). It is significant that the majority opinion does not even mention article 5 of the Illinois Cities and Villages Act of 1872 which, as quoted above, granted the City of Chicago broad regulatory powers over the milk industry.

From the fact that the statute and the regulations of the state Department of Health contain a few regulations

of paper containers (such as the provision in item 10 of section 15 that "single service containers . . . shall be manufactured and transported in a sanitary manner"), the majority opinion concludes that "the use of single service containers such as used by the plaintiff for the distribution of milk is permitted and approved upon compliance with the Act" (R. 1791). The opinion stresses the fact that the plaintiff has complied with the state requirements and has been issued a certificate of approval:

"By this token it (the plaintiff) has been authorized by the state to sell and distribute its product within the confines of Illinois in single service containers. The city of Chicago, however, by the prohibition contained in its ordinance, denies this right conferred by the State." (R. 1791-92.)

This conclusion fails to take into account the rule that in construing a statute the entire act must be considered. Any certificate of approval granted to the plaintiff was granted under the statute and, if the plaintiff may be said to have a "right conferred by the state" to use a container that merely meets state requirements, that right was derived from the statute. This very statute said that the power of cities to forbid the use of paper containers was not impaired. Certainly the "certificate of approval" and any right to use a particular container are effective only within the purview of the statute. As a result a certificate or right granted under the statute is subject to the municipal regulation which the statute expressly permits. When the entire act is considered, this is what the legislature said. The prohibition in the ordinance does not deny a right conferred by the statute when the statute itself says that the prohibition may be imposed.

The basic fallacy in the reasoning of the Circuit Court of Appeals is shown by following the steps by which the con-

elusion of invalidity was reached. The reasoning of the opinion is: the statute regulates paper containers and permits their use; in prohibiting the use of what the statute permits, the ordinance conflicts with the statute; the rule therefore applies that ordinances may not conflict with the state law; and the saving clause may not be construed to give the city "authority to outlaw that which the state has legalized". The opinion finds the conflict, not with the statute as a whole, but with isolated sections that mention paper containers. The court does not even refer to the saving clause in the statute until *after* it has determined that the ordinance violates a public policy found in another part of the statute.

In finding a public policy from only a part of the statute and in disregarding the saving clause, the majority opinion violates the familiar rule that in construing a writing the entire writing is to be considered. See *People v. Whealan*, 353 Ill. 500 (1933), at p. 506;

"It is a fundamental rule of statutory construction that the intention of the lawmaker should be deduced from a view of the whole statute and of every material part of it." (Citing many cases.)

Another cardinal rule of construction is violated by the opinion in the disregarding of the language of the saving clause: words should not be held to be surplusage if they may possibly be given effect. In *Crozer v. People*, 206 Ill. 464 (1904), the rule was stated. (pp. 469-470)

"It is a cardinal rule of construction that a statute should be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant, but that it shall be so construed, if possible, that every sentence and word shall be given its ordinary meaning and acceptation. (*Decker v. Hughes*, 68 Ill. 33; *Thompson v. Bulson*, 78 id. 277; *Perteet v. People*, 65 id. 230.) In the last case the following lan-

guage from Lord Coke is quoted: '*The good expositor makes every sentence have its operation; gives effect to every word; will not construe it so that anything shall be vain or superfluous, but so expressed that one part of the act may agree with the other and all may stand together.*'" (Italics added.)

In view of the language of the saving clause, the opinion finds in the statute a declaration of public policy that is not there. This again violates a cardinal rule of statutory construction, stated in *Sup v. Cervenka*, 331 Ill. 459 (1928), where the Illinois Supreme Court said (pp. 461-462):

"It is an elementary rule in the construction of a statute that the intention of the legislature must primarily be determined from the language of the statute itself and not from conjecture *aliunde*. When that language is plain and unambiguous and conveys a clear and definite meaning there is neither necessity nor authority for resorting to statutory construction. *If the words of a statute are plain and the legislative purpose manifest, that purpose must be given effect. The courts have no legislative powers, and in the interpretation and construction of statutes their sole function is to determine, and within the constitutional limits of the legislative power to give effect to, the intention of the legislature.* They cannot read into a statute something that is not within the manifest intention of the law-making body as gathered from the statute itself. To depart from the meaning expressed by the words is to alter a statute—it is to legislate and not to interpret. . . ." (Italics added)

It is difficult to understand why the Circuit Court of Appeals went as far as it did in disregarding the language of the saving clause. The opinion says that, if the saving clause was given effect, "it would make the state subservient to the city". The effect of the opinion is that it is beyond the power of a state legislature to prescribe minimum standards to be observed throughout the state and at the same time to authorize municipalities to fix

more stringent standards if they consider it necessary to do so. If, in such a situation, the state could be said to be "subservient", it has voluntarily assumed that status and has the power to change it when it sees fit. If the state legislature sees nothing incongruous in such a relationship with its municipalities, the mere fact that it may not coincide with the court's conception of the proper symmetrical organization of government is immaterial. Furthermore, the state is not subservient to the city if the state permits what the city forbids; each is merely regulating in its own sphere to meet its own particular needs. There is no rule of law that, regardless of the scope of the statutory grant of authority, the municipality may not forbid what the state permits. There is, of course, a rule that when a statute and an ordinance conflict or when an ordinance is contrary to a public policy stated in a statute, the statute controls.\* But this rule applies only when the contrary intention of the legislature is not revealed by the express language of the statute. The rule has no application when the intention of the legislature is expressed in clear language as in the saving clause of the Milk Pasteurization Plant Law of 1939. Nevertheless, this seems to be the rule applied by the two majority judges of the Circuit Court of Appeals.

The Circuit Court of Appeals does not mention the most pertinent Illinois case construing legislative grants of municipal power: *City of Ottawa v. Brown*, 372 Ill. 468 (1939). It is the most pertinent case because the statute construed contained a saving clause.

The *City of Ottawa* case involved a 1930 ordinance that

\* This rule has been applied in a number of Illinois cases, some of which are cited in the opinion of the Circuit Court of Appeals. *Village of Atwood v. Cincinnati, etc. R. Co.*, 316 Ill. 425 (1925); *City of Marengo v. Rowland*, 263 Ill. 531, 534 (1914); *City of Chicago v. Union Ice Cream Mfg. Co.*, 252 Ill. 311, 315 (1911); *City of Chicago v. Drogasawacz*, 256 Ill. 34, 37 (1912).

contained detailed regulations of gasoline filling stations; the defendant was accused of erecting a filling station without frontage consents as required by the ordinance. An Illinois statute of 1919 regulated "the storage, transportation, sale and use of gasoline" and authorized the state Department of Trade and Commerce to adopt regulations "except in cities or villages where regulatory ordinances upon the subject are in full force and effect." The question in the case was whether or not the saving clause was operative, in view of the provisions of the Cities and Villages Act of 1872\* authorizing cities "to regulate and prevent storage . . . of petroleum" and an ordinance of 1916 regulating only the storage of gasoline and not undertaking to regulate filling stations. The court held that by virtue of the 1916 ordinance the city had sufficiently exercised its powers under the 1872 statute to enable it either to amend the 1916 ordinance or to adopt a broader one; and that consequently the 1930 ordinance was authorized and valid.

This *City of Ottawa* case presents a great contrast to the holding of the Circuit Court of Appeals. The Illinois Supreme Court held there that the 1919 saving clause, which was less extensive than the one here, preserved the pre-existing powers of the city granted in the 1872 act. The Illinois Supreme Court did not disregard the saving clause but interpreted it broadly and gave full effect to it. Here the Circuit Court of Appeals has not only failed to consider the 1872 act, but has disregarded the language of the 1939 saving clause. It has also disregarded this recent decision by the Illinois Supreme Court showing how

\* This is the very statute involved in the case at bar, article 5 of the Cities and Villages Act of 1872 (Public Laws of Illinois, 1871-72, pp. 231-233). Article 5 contains broad grants of powers to cities and villages. While the *City of Ottawa* case involved section 65 of article 5, the instant case involves sections 50, 53, 66, and 78.

the state courts construe legislative grants of municipal power. Undoubtedly the Illinois Supreme Court would not have decided the case at bar as has the Circuit Court of Appeals.

It is true that the majority opinion of the Circuit Court of Appeals attempts to give the saving clause some vitality by saying:

“The courts of Illinois have frequently recognized that power exercised by municipalities may be conferred or withdrawn by implication (citing cases). It therefore appears reasonable that the sole purpose of the saving clause was to prevent a construction by implication, withdrawing the vast authority which the city had theretofore had over the milk industry. . . . The purpose of the saving clause, in our judgment, was to preserve in the city the unquestioned right to continue in a field which had been entered by the state, and in which, thereafter, each should have co-extensive power and authority.” (R. 1792-93.)

If the city and the state have “co-extensive power and authority,” it would seem that the city has power to forbid the use of paper milk containers; the state clearly has the power even though it has not been exercised. The court’s own statement of the purpose of the saving clause is thus inconsistent with its holding that the city regulation is invalid.

This self-contradiction is inevitable, for the language of the opinion cannot conceal the fact that the holding nullifies the saving clause. If there is a need for both city and state regulations, as evidenced by the saving clause, there are bound to be differences between them. Any city regulation that goes further than the minimum state regulations forbids what the state regulations permit. Under the holding of the Circuit Court of Appeals, all that remains of the city’s power to protect its citizens from a

contaminated milk supply is the empty authority to make regulations that coincide exactly with state regulations. It seems clear that this holding invalidates other provisions of the milk ordinances of Illinois municipalities. For example, section 7 of the 1939 statute contains labeling provisions, requiring milk containers to be marked with the name of the contents, with the word "pasteurized" if the contents are pasteurized, and with the name and the post office address of the pasteurization plant. The labeling provisions in the Chicago ordinance (sec. 3090, R. 37-38) are much more extensive, requiring (among other things) that the date on which the milk is to be sold shall be marked on the container, a regulation designed to insure that too great an interval of time does not elapse between pasteurization and the sale to the consumer. The statute permits the use of undated containers and approves their use; while the ordinance prohibits the use of undated containers. If the holding of the Circuit Court of Appeals stands, the city requirement is invalid because it conflicts with the "public policy" of the state as expressed in the statute.

The effect of the decision of the Circuit Court of Appeals is far-reaching. Not only the City of Chicago but every city and village in Illinois are deprived of power to make effective local regulations of the milk industry. And the decision goes further. The boundary between the fields of state and local regulations may not be clearly defined. The decision of the Circuit Court of Appeals in effect takes away from the state legislature the power to fix the boundary and the court, in the exercise of its function to construe statutes, assumes the power itself. In fixing the boundary where it did, the Circuit Court of Appeals has affected adversely the regulatory powers of Illinois cities

and villages over other subjects that the state has begun to regulate.

There are thus important reasons why this court should review and reverse the judgment of the Circuit Court of Appeals.

*The defendants urge this court to review and decide on the merits the local question of the city's power.*

The defendants do not ask the court to review and reverse the case on the ground that, since the question of the power of the city to enact the ordinance is a local one to be decided by the state courts alone, the Circuit Court of Appeals should have refused to decide it. The position of the defendants on this aspect of the case requires an explanation.

It may be that the granting of the injunction and the declaratory judgment constitutes an unjustified interference by a federal court with local, state matters. The 1939 state statute, which is held to deprive the city of power to require the use of a particular kind of milk container, has not been construed by the state courts. More than a narrow controversy between two litigants is involved. The problem is one of public law—the construction of a legislative grant of municipal power—which affects all municipalities in Illinois. In this situation the Circuit Court of Appeals should perhaps have been reluctant to interfere by employing the extraordinary remedy of a federal writ of injunction. *Hawks v. Hamill*, 288 U. S. 52 (1933); *Railroad Commission of Texas v. Pullman Co.*, 312 U. S. 496 (1941). Similarly it would seem that a federal court should perhaps have exercised its discretion to refuse to enter a declaratory judgment. The Federal Declaratory Judgment Act (Act of June 14, 1934, 48 Stat. 955, 28 U. S. C., Sec.

400) gives federal courts discretion to grant or withhold the declaratory relief sought. This was noted in *American Automobile Insurance Company v. Freundt*, 103 F. 2d 613 (C. C. A. 7th, 1939) where the court said (p. 619):

"It is clear from the report of the Senate Judiciary Committee that the Committee understood that under the proposed Act the district courts would enjoy a measure of discretion in the matter of granting or withholding declaratory relief."

In *Borchard on Declaratory Judgments* (1924) one of the grounds for withholding declaratory relief was stated as follows (p. 111):

"The declaration will be refused where in the court's opinion it is inexpedient for some reason outside the record, such as public policy, or where the question might be raised again in some other way or where it would be embarrassing in the operations of government."

Nevertheless the defendants do not ask this court to rule merely that the Circuit Court of Appeals should not have decided the question of the power of the city to enact the ordinance. To remand the cause to the District Court with directions to retain it pending the determination of the state issue in the state courts, as was done in the *Pullman Company* case, would bring much inconvenience to the litigants. While the lower courts should perhaps have refused to consider the question at all, their rulings adverse to the city have clouded the powers of Illinois municipalities. Only by obtaining from this court a decision that the city has power to enact the ordinance may the city be restored to the position it had before the decision by the Circuit Court of Appeals. The suit was begun more than two and a half years ago and has gone through the lengthy process of extensive master's hearings, hearings

in the trial court on objections to the master's report, an appeal to the Circuit Court of Appeals, and now a petition for certiorari to this court.\* The question of the city's power—unlike the local questions in the *Hawks* and *Pullman Company* cases—is free from difficulty. If the cause were remanded to await a determination of the question by the highest state court, the far-reaching effects of the action of the Circuit Court of Appeals in cutting down the powers of Illinois municipalities will remain operative for many months to come. The damage done should be remedied as soon as possible.

For these reasons the defendants urge this court to decide the question of the power of the city to enact the ordinance under the 1872 and 1939 state statutes.\*

## II.

### The ordinance is not invalid on constitutional grounds.

The validity of the ordinance under the federal and Illinois constitutions was questioned in the complaint. It alleged (R. 11) that the ordinance deprives the plaintiff

\* In connection with the duration of the litigation, it is important to realize that the defendants have been unable to take advantage of the provisions of section 266 of the Judicial Code (28 U. S. C. 380) for the speedy determination of constitutional questions in the trial court and on appeal. This is the familiar provision that an application for an injunction to restrain state officers in the enforcement of a statute on the ground of its unconstitutionality shall be heard and determined by three judges and that a direct appeal may be taken to this court from the decree granting or denying the injunction. In this case the plaintiff sought an injunction on the ground that the ordinance was unconstitutional, the trial court so found, and the trial court entered the injunction prayed. Since the question is the constitutionality of an ordinance rather than the constitutionality of a statute, defendants have been unable to have the matter determined by a three-judge trial court or to appeal directly to this court. There have been a number of decisions to the effect that section 266 of the Judicial Code does not apply to ordinances. *Cumberland Telephone & Telegraph Co. v. City of Memphis*, 198 F. 955 (D. C. Tenn. 1912); *City of Baton Rouge v. Baton Rouge Waterworks Co.*, 30 F. 2d 895 (C. C. A. 5th, 1929).

of the equal protection of the laws and of its property without due process of law in violation of the fourteenth amendment to the federal constitution and article 2, section 2 (a due process clause similar to the fourteenth amendment clause) of the Illinois constitution. Most of the evidence heard by the master dealt with the reasonableness of the ordinance as an exercise of the police power. The trial court found, contrary to the master's findings (R. 1734), that the ordinance was unconstitutional (R. 1757). The majority opinion of the Circuit Court of Appeals states (R. 1794) that it does not "discuss at length or decide" this question. However, the opinion continues with a brief discussion of the question that indicates that the two majority judges considered the ordinance unconstitutional. The presumption that the ordinance is valid is said to be "little more than a shadow" because, when the ordinance was passed, the use of paper containers was in its incipient stage. And the evidence in the record that the use of such containers presents a hazard to health is said to carry "little, if any, conviction" in view of other factors—chiefly the fact that the containers are permitted elsewhere.

We discuss as one question (as did the lower courts) the reasonableness of the ordinance under the due process clauses of the federal and Illinois constitutions, although one clause presents a question of federal law and the other a question of state law; as shown by the cases cited below, the same principles govern each clause.

In casting doubt on the constitutional validity of the ordinance, the Circuit Court of Appeals has committed the error of substituting its judgment for the judgment of the Chicago City Council as to the need for the ordinance. Even though only a dictum, this judicial pronouncement of

the unreasonableness of the ordinance is an interference with legislative discretion in view of the evidence in the record. And the constitutional question must be decided if this court holds that the city had power to pass the ordinance. For these reasons the law as to the validity of legislation enacted under the police power and the evidence about the possible public health hazards in the use of paper milk containers must be considered.

**(a) Principles governing the validity of the ordinance under the due process clause.**

The rules for determining the reasonableness of legislation enacted under the police power have been announced in many opinions. We note a few illustrative cases that indicate the scope of judicial review. In *Standard Oil Company v. City of Marysville*, 279 U. S. 582 (1928), the court considered the validity of an ordinance which required that all tanks used for the storage of petroleum products be placed underground. Considerable evidence was heard about the relative safety of storage above and beneath the ground. Mr. Justice Stone delivered the opinion of the court and said (p. 584):

"We need not labor the point, long settled, that where legislative action is within the scope of the police power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for the determination of courts, but for that of the legislative body on which rest the duty and responsibility of decision." (Citing many cases.)

In *Laurel Hill Cemetery v. San Francisco*, 216 U. S. 358 (1910), the court considered the validity of an ordinance which prohibited the burial of the dead within the city and county limits. The ordinance was attacked on the ground that there was no hazard to public health in the main-

tenance of cemeteries within cities. The court in its opinion (by Mr. Justice Holmes) showed clearly its reluctance to substitute its judgment for that of the municipal legislative body. (p. 365):

"But the propriety of deferring a good deal to the tribunals on the spot is not the only ground for caution. If every member of this bench clearly agreed that burying grounds were centers of safety, and thought the board of supervisors and the supreme court of California wholly wrong, it would not dispose of the case. There are other things to be considered. Opinion still may be divided, and if, on the hypothesis that the danger is real, the ordinance would be valid, we should not overthrow it merely because of our adherence to the other belief. Similar arguments were pressed upon this court with regard to vaccination, but they did not prevail. On the contrary, evidence that vaccination was deleterious was held properly to have been excluded." (Citing *Jacobson v. Massachusetts*, 197 U. S. 11 (1904), where the compulsory vaccination statute of Massachusetts was held valid.)

*Schmidinger v. Chicago*, 226 U. S. 578 (1912), involved the validity of an ordinance prescribing the weights for loaves of bread and prohibiting the sale of any loaves of bread which did not comply with the prescribed weights. Concerning the validity of this ordinance the court said (pp. 587-8):

"\* \* \* It is contended that the limitation of the right to sell bread which this ordinance undertakes to make in fixing a standard loaf \* \* \* is such an unreasonable and arbitrary exercise of legislative power as to render it unconstitutional and void. This court has frequently affirmed that the local authorities intrusted with the regulation of such matters, and not the courts, are primarily the judges of the necessities of local situations calling for such legislation, and the courts may only interfere with laws or ordinances

passed in pursuance of the police power where they are so arbitrary as to be palpably and unmistakably in excess of any reasonable exercise of the authority conferred." (Citing many cases.)

The presumption that the ordinance is valid is as strong on appeal as in the trial court. In *So. Carolina State Highway Dept. v. Barnwell Bros.*, 303 U. S. 177 (1936), a three-judge district court enjoined the enforcement of a statute forbidding the use on highways of trucks exceeding a prescribed width. In reversing the decision of the trial court, Mr. Justice Stone said at pp. 191-2:

"Since the adoption of one weight or width regulation, rather than another, is a legislative not a judicial choice, *its constitutionality is not to be determined by weighing in the judicial scales the merits of the legislative choice and rejecting it if the weight of evidence presented in court appears to favor a different standard.* (Citing cases.) Being a legislative judgment it is presumed to be supported by facts known to the legislature unless facts judicially known or proved preclude that possibility. Hence, in reviewing the present determination *we examine the record; not to see whether the findings of the court below are supported by evidence, but to ascertain upon the whole record whether it is possible to say that the legislative choice is without rational basis.* (Citing cases.) Not only does the record fail to exclude that possibility, but it shows affirmatively that there is adequate support for the legislative judgment." (Italics added.)

The Illinois Supreme Court applies the same rules as the United States Supreme Court in considering the validity of legislation enacted under the police power. See *People v. Quality Provision Co.*, 367 Ill. 610 (1938), where the court noted that legislation will not be held unreasonable if the subject may be regarded as debatable (p. 614). See also *Gundling v. City of Chicago*, 176 Ill. 340 (1898);

*City of Chicago v. Bowman Dairy Co.*, 234 Ill. 294 (1908);  
*City of Chicago v. Arbuckle*, 344 Ill. 597, 604-5 (1931).

These principles have recently been applied to uphold the regulation of containers in a case that seems controlling in the case at bar: *Pacific States Box & Basket Co. v. White*, 296 U. S. 176, 181-182 (1935). The regulation there held valid required that raspberries and strawberries be packed only in certain containers called "hallocks" of specified dimensions. One of the reasons ~~there~~ given by Mr. Justice Brandeis for holding the regulation not invalid was that "the character of the container may be an important factor in preserving the condition of raspberries and strawberries, which are not only perishable but tender." At page 182 Mr. Justice Brandeis said:

"Different types of commodities require different types of containers; and as to each commodity there may be reasonable difference of opinion as to the type best adapted to the protection of the public. Whether it was necessary in Oregon to provide a standard container for raspberries and strawberries; and, if so, whether that adopted should have been made mandatory, involve questions of fact and of policy, the determination of which rests in the legislative branch of the state government. The determination may be made, if the constitution of the State permits, by a subordinate administrative body. With the wisdom of such a regulation we have, of course, no concern. We may enquire only whether it is arbitrary or capricious. That the requirement is not arbitrary or capricious seems clear. That the type of container prescribed by Oregon is an appropriate means for attaining permissible ends cannot be doubted."

A great variety of regulations of the milk industry have been sustained. In *Koy v. City of Chicago*, 263 Ill. 122, 130 (1914), the Illinois Supreme Court termed the regulation of the sale of milk "an imperative duty." *Nebbia v. New*

*York*, 291 U. S. 502 (1933), upheld a state law that authorized an administrative board to regulate the price of milk. (The opinion of Mr. Justice Roberts at pp. 521-530 contains a comprehensive review of cases involving police power regulations.) We cite other cases holding milk regulations valid as indicated:

*Adams v. Milwaukee*, 228 U. S. 572, 583 (1911), an ordinance prohibiting milk to be brought into the city unless it was produced by tuberculin tested cattle.

*Commonwealth v. Wheeler*, 205 Mass. 384, 91 N. E. 415 (1910), a statute fixing a minimum standard of butter fat content for milk and prohibiting the sale of substandard milk.

*City of Milwaukee v. Childs Co.*, 195 Wis. 148, 217 N. W. 703 (1928), an ordinance prohibiting the sale of milk except in the original containers.

*Pacific Coast Dairy v. Police Court*, 214 Cal. 668, 8 Pac. 2d 140 (1932), a statute imposing a penalty for not returning milk containers marked with the registered brand of the owners.

*City of Chicago v. Bowman Dairy Co.*, 234 Ill. 294 (1908), an ordinance requiring milk bottles to contain a permanent indication of their capacity.

**(b) Evidence in the record shows that the prohibition of paper containers for delivering milk is not unreasonable.**

There is no need to labor the obvious point that the regulation of the distribution of fresh milk is a vital necessity, particularly in a city the size of Chicago. The production and distribution of 1,300,000 quarts of an easily contaminated liquid daily consumed in Chicago obviously give rise to special problems of regulation. And a peculiar

importance is attached to milk regulations by the fact that milk is the staple item in the diet of infants.

The master heard much evidence on the question of the validity of the ordinance as a reasonable exercise of the police power. More than twenty witnesses testified for the plaintiff (R. 132-940, R. 1243-1306) and nine witnesses testified for the defendants (R. 942-1242). Approximately 120 exhibits were admitted in evidence (R. 1397-1708). There was admittedly testimony by some of the plaintiff's witnesses that the plaintiff's containers are sufficiently sanitary to permit their use for delivering milk. On the other hand, the testimony of the plaintiff's own witnesses revealed that paper containers have characteristics that create serious public health problems.

This is apparent from the master's report. After reciting the facts about the manufacture, processing, and filling of paper containers (R. 1718-22), the master found (R. 1723) that a legislative body might reasonably conclude that contamination might occur at one or more of the many stages from the pulp to the sealed container through carelessness, desire to save expense, inadequate facilities, or other reason. The master then discussed the evidence and made findings about the following matters: absorbency of paper containers (R. 1723-24), paraffin particles in the milk (R. 1724), odors from paraffin or bacteria (R. 1724-26), effective sanitary control of paper containers (R. 1726-29), non-transparency of paper containers and non-rising of cream to the top of containers (R. 1729-30). The master continued with the following general finding:

"I find that there is evidence in the record, from plaintiff's own witnesses, independent of the corroborative testimony of Dr. Arnold, the City's witness, from which the City Council could reasonably have concluded that prohibition of paper containers was neces-

sary and appropriate to protect the purity and wholesomeness of milk, or, to state the proposition another way, it is at least doubtful whether plaintiff has proved that there is not sufficient evidence tending to establish a reasonable basis for such conclusion." (R. 1734).

The master then made specific findings of fact (R. 1734-35):

"I find, that the legislative body may reasonably have based its decision on evidence tending to prove the following:

"There are steps in the manufacture, conversion and filling of paper containers in which bacteria may get into the walls of the containers.

"Paper containers, even when paraffined, are to some extent absorbent and the milk may absorb such bacteria.

"Sanitary conditions differ from one paper mill to another and even in the same mill from time to time.

"The sanitary condition of the mill is a significant factor as to the condition of the finished container.

"The sanitary condition of the paper board blank determines the sanitary condition of the finished container.

"Particles of paraffin get into the milk and constitute a foreign substance which preferably should not be in milk, especially for babies.

"Odors from paraffin, whether the paraffin is fresh or not, may get into the milk.

"If the paper board contains a high amount of bacteria, there may exude objectionable odors which may get into the milk.

"The control and precautions by paper manufacturers themselves may not be adequate.

"In the case of glass milk bottles, the City has the cleaning process at hand locally and can exercise complete control; in the case of paper containers, inspection at remote places may be necessary but impractical or too expensive.

"Some paper containers have been shown to contain high bacterial counts.

"Paper containers are not transparent as glass bottles, so that it is difficult to observe the quality of the

milk or whether the milk contains dirt or other foreign body.

"Cream does not rise to the top in paper containers, so that purchasers may not readily know whether they are getting milk of the required fat content.

"The United States Public Health Service Sanitation Board in June 1939 criticized paper containers on account of their absorbency and the sloughing off of paraffin."

The master concluded that the court must hold the ordinance valid and the prohibition of paper containers reasonable, and recommended that the court should not issue the injunction or render the declaratory judgment requested. (R. 1735-36.)

The majority opinion of the Circuit Court of Appeals said of the evidence about the reasonableness of the ordinance: "*It is true the record discloses some evidence in support of defendants' contention that the use of such containers presents a hazard to health*" (R. 1794). Without more this evidence would seem to be enough, under the applicable principles of law discussed above, to show that a court would be interfering with the legislative discretion of the Chicago City Council in holding that the ordinance was unreasonable in forbidding the use of paper milk containers. This was the view of the dissenting judge who stated:

"The master found upon substantial evidence a number of facts bearing upon the undesirability of the use of paper milk bottles, showing clearly that at least the question of desirability of their use is debatable. In such case the city council is entitled to exercise its own administrative and legislative judgment,—a judgment not to be superseded by verdict of a jury or decision of a court." (Citing cases.) (R. 1796.)

But the majority opinion of the Circuit Court of Appeals and the opinion of the trial court both indicated that their

authors believed that other factors in the case outweighed the evidence showing possible health hazards in the use of paper milk containers. We turn to a discussion of these other factors to show that they are not controlling here.

### **Presumption of validity of ordinance.**

The cases cited above show in clear language that whoever attacks the validity of legislation has the burden of establishing its validity and that there is a strong presumption that legislation enacted under the police power is valid. The majority opinion of the Circuit Court of Appeals says that here the presumption "could be little more than a shadow" since the use of paper milk containers was in its incipient stage when the ordinance was enacted in 1935 so that the legislative body "could not, from the nature of things, have considered and weighed their advantages and disadvantages" (R. 1794). We submit that this ruling is not sound constitutional law.

The defendants have never taken the position in this case that the reasonableness of the ordinance must be determined as of the time of its passage in 1935, for it is admitted that a law valid when passed may become invalid thereafter by reason of a change of conditions. This is pointed out in the opinion of the Circuit Court of Appeals (R. 1789). But certainly this does not mean that there is no presumption of the validity of legislation that is attacked on the ground that it became unreasonable after its enactment. Since the question of reasonableness is determined in the light of conditions existing today, we are not concerned here with what the City Council actually did consider before it enacted the ordinance, but with what it might reasonably have considered assuming conditions to have been as they are today or, rather, with what it

might reasonably consider today in the light of today's conditions. For this reason the presumption of validity is just as strong as if the ordinance had been passed today or as if today's conditions existed when the ordinance was passed.

The holding of the Circuit Court of Appeals would give courts a much greater latitude in invalidating legislation which affects conditions that come into existence after its enactment. The presumption of validity arises upon the enactment of the legislation. Obviously the strength of the presumption is not impaired by advancing age.

#### **Use of paper milk containers elsewhere.**

There is much evidence in the record about the use of paper containers for distributing milk in municipalities other than Chicago. The trial judge in his opinion placed much reliance on this evidence, as well as on the absence of evidence tracing "serious disease or minor ailment" to the use of paper containers (R. 1753). Likewise the majority opinion of the Circuit Court of Appeals emphasized that the use of paper containers "has been authorized and permitted by more than 200 cities and villages in the United States, including such cities as Washington, D. C., New York and Philadelphia, as well as practically all of the cities and villages near and adjacent to the City of Chicago" (R. 1794).

These factors have no bearing on the validity of the Chicago ordinance under the cases cited above. At the hearing before the master the defendants objected (R. 148) to the introduction of evidence of the use of paper milk containers in other municipalities if this evidence was to be considered on the question of the reasonableness

of the ordinance. Obviously the use of the containers elsewhere has no factual bearing on the case unless accompanied by evidence that municipalities not prohibiting them considered carefully the public health hazards involved. As shown below, the slight evidence in the record about the precautions taken in a few municipalities shows that the precautions were very inadequate.

The question of the reasonableness of the ordinance must be determined by the evidence about the sanitary qualities of the paper container and not by a roll call that arrays on one side the municipalities not prohibiting its use and on the other side the municipalities prohibiting its use. Obviously evidence of permission in one municipality or state cannot affect the validity of a prohibition in another municipality or state. The fact, for example, that Chicago may permit automobiles bearing loud speakers to tour the streets would afford no basis for an attack upon an ordinance of New York City prohibiting the use of those devices in congested areas. So the fact that other states did not limit the weight of motor trucks using their highways would not affect the validity of the Texas statute prescribing limitations of weight, *Sproles v. Binford*, 286 U. S. 374 (1931). The fact that Illinois has not seen fit to require compulsory vaccination could not affect the validity of a Massachusetts statute requiring compulsory vaccination, *Jacobson v. Massachusetts*, 197 U. S. 11 (1904). Oregon's regulations concerning fruit containers are not invalid because they prohibit the use of containers permitted elsewhere, *Pacific States Box and Basket Co. v. White*, 296 U. S. 176 (1935). Instances could readily be multiplied.

Also, the ordinance may not be held unreasonable because no instance of contagion or death resulting from the use of paper containers has been proved by the defendants.

The exercise of police power for the protection of the public health is not conditioned upon the prior occurrence of disease and death. A future hazard is as strong a justification for the exercise of the power as is a prior disaster. An antecedent outbreak of amoebic dysentery, for example, is not an essential condition to the exercise of the city's power to eliminate sources of danger in plumbing systems. So here, the city's power to protect itself from hazards to public health which it believes are inherent in the use of plaintiff's containers exists regardless of whether or not their use elsewhere has resulted in disaster. The plaintiff's witness, Packer, testified in his deposition that it was impossible to trace cases of contagion to a single service container (R. 1374-5). As a result the lack of evidence of specific cases of illness attributable to the use of these containers is in fact of no significance. See *Jacobson v. Massachusetts*, 197 U. S. 11 (1904), where the court rejected proof that vaccination was ineffective to prevent disease; and *Purity Extract Co. v. Lynch*, 226 U. S. 192 (1912), where a statute forbidding the sale of "malt liquors" was held to apply validly to a non-intoxicating malt liquor.

From the testimony of the plaintiff's witness, Packer, it is also apparent that the consumers of milk have been used in many municipalities as experimental media for the determination of the sanitary quality of paper containers. Packer testified in substance (R. 1368-9) that regulations governing the handling of paper containers are necessary; that no regulations exist in the City of Philadelphia, although regulations were being formulated at the time of the taking of his deposition. He further testified that regulations were as necessary in 1929 when the use of paper containers was first permitted in Philadelphia as they are now, but that regulations were not then formulated because

nobody knew what the regulations ought to be—"somebody had to pioneer" (R. 1370).

The principal witness for the plaintiff, Dr. John R. Sanborn, testified that in his opinion, in the interest of public health, standards should be formulated and adopted by public health authorities governing the production of paper board for use in paper milk containers and governing also the subsequent processing and handling of the paper board until the container is filled with milk. He further testified that he had attempted to ascertain what cities had adopted regulations with respect to paper containers and that so far as he knew no cities other than Baltimore, Maryland and Reading, Pennsylvania had adopted any regulations. In his opinion neither the Baltimore nor the Reading regulations were satisfactory (R. 244-7).

In this state of the record the fact that paper containers are used for the distribution of milk in some municipalities other than Chicago proves nothing with respect to the unreasonableness of prohibiting paper milk containers in Chicago.

Reliance upon experience elsewhere, as that of the trial judge and the Circuit Court of Appeals in this case, was rejected in *Standard Oil Company v. City of Marysville*, 279 U. S. 582 (1928), which involved an ordinance requiring the storage of gasoline below ground. The court said (p. 586):

"The facts that the tanks of petitioners within the city limits have been operated successfully above ground; that appliances used by them are of the best type; that fires in connection with their many tanks located elsewhere have been relatively infrequent, and numerous others found by the master, were properly for the consideration of the city council in determining whether the ordinance should be enacted, but they fall far short of withdrawing the subject from legislative determination or establishing that the decision made was arbitrary or unreasonable. • • •"

"We may not test in the balances of judicial review the weight and sufficiency of the facts to sustain the conclusion of the legislative body, nor may we set aside the ordinance because compliance with it is burdensome. \* \* \*"

### **Regulation of paper milk containers by the State of Illinois.**

Another factor noted by the majority opinion of the Circuit Court of Appeals is that "the legislature of the State of Illinois and its Department of Health have approved the use of such containers since 1939" (R. 1794). As we have pointed out in Point I of this brief, the State of Illinois in regulating paper milk containers provided expressly in the 1939 statute that cities could regulate further. Also, the recognition of the use of paper milk containers by the state is merely another instance of their use elsewhere. This factor, as we have just explained, is immaterial in fact and in law.

### **Regulation of paper milk containers in model ordinance of United States Public Health Service.**

Another element emphasized by the majority opinion of the Circuit Court of Appeals is "the fact that the United States Public Health Service, whose model ordinance has been widely adopted by cities throughout the United States, including the City of Chicago, amended its ordinance in 1939, so as to include the regulation of single-service containers" (R. 1794).

We note briefly the facts involved. The United States Public Health Service, which performs advisory functions only as to municipal milk regulations (R. 609), has prepared a model ordinance and code of regulations, both of which the City of Chicago follows substantially (R. 1065). While this case was pending before the master, section 10 of the Health Service's model ordinance was amended

to provide that milk may be delivered in single-service containers (defendants' exhibit 17, R. 980, R. 1678-79). At the time when this amendment was made, the Health Service also added provisions to its model code of regulations providing for the regulation of single-service containers. Included in the regulations\* recommended were the following:

"(5) The manufacture, packing, transportation and handling of single-service containers and container caps and covers are conducted in accordance with the following requirements. *Inspections required herein may be made by the health officer or by any agency authorized by him.* . . ."

"(c) All operations at the fabrication plant and during transportation of the manufactured articles shall be so conducted as to reduce to a minimum the possibility of contaminating the manufactured articles, as prescribed in items 13p, 14p, and 15p" (R. 1590-1; italics added).

These regulations require public health officials to inspect the paper mills and converting or fabrication plants in which the various processes in the manufacture of paper milk containers take place. The regulations say that the inspections may be made "by the health officer or by any agency authorized by him". The paper mills and converting plants where paper containers are made are located in various parts of the country—e.g., at the time of the trial the paper in the plaintiff's container was made in the West Virginia mill of the Cherry River Paper Company (R. 164) and the paper was converted into the containers by another manufacturer at Middleton, Ohio (R. 198). The inspection of the manufacturing of the plaintiff's container would thus require Chicago health officials to travel to West Virginia

\* The Model Code of Regulations of the United States Public Health Service also contained a statement about the characteristics of paper milk containers which shows that their prohibition is not unreasonable:

"The porous condition of paraffined containers now available and the sloughing off of particles of paraffin into the product are undesirable, and manufacturers of single-service containers are urged to make every effort to provide a non-absorbent non-flaking surface" (plaintiff's exhibit 61, R. 1591).

and Ohio; and there are other types of containers for which the paper is made and fabricated in many other states (see map, R. 1479). Also there is no "agency authorized" by health officers to inspect paper mills and fabrication plants (Prucha, R. 1734).

In contrast with the expensive devices suggested by the regulations of the Health Service for the supervision of paper milk containers, the sanitary quality of the glass containers which the Chicago ordinance requires may be supervised locally. Since the glass container can be effectively sterilized at the dairy when it is being filled with milk (Sanborn, R. 169), there is no need to inspect any aspect of the glass container before the cleaning process at the dairy. Not only are glass containers absolutely sterile when manufactured (R. 169), they receive bactericidal treatment before each use and with the best method of sterilization it is possible to obtain a sterile glass bottle "according to bacteriological tests" (R. 170). The bactericidal treatment at the local dairy can be thoroughly inspected and controlled locally. In Chicago this control consists of regular inspections of the cleaning process, including the operation of the washing equipment, the temperatures of the solutions used, the bottling equipment, etc. (R. 970-72). Also occasional tests are made locally of the bacterial content of sample bottles (R. 972).

Instead of permitting the use of paper milk containers, the proper regulation of which requires inspection of manufacturing processes at far-distant places, the Chicago City Council requires the use of glass containers which may be (and are) inspected locally. This is not an unreasonable legislative determination, even though the model ordinance of the United States Public Health Service permits both glass and paper milk containers.

### Use of paper containers for other purposes.

In holding that the ordinance was void if it forbade the use of paper milk containers, the trial judge placed great reliance on evidence about other uses of paper containers in Chicago (opinion, R. 1752). Of one type of container, the opinion states that it is less meritorious in structure and design than plaintiff's and is in daily use in Chicago for the sale of milk, chocolate milk, ice cream, and other liquids by drug stores, hotels, restaurants, and soda fountains.\* The other type, the opinion says, is in common use for cheese, butter, meat, drinks, and other edibles.

The record shows that the use of paper containers for purposes other than the delivery of fresh milk does not make the prohibition of the use of paper milk containers unreasonable or discriminatory. The defendants introduced evidence showing that the characteristics of the other commodities sold in paper containers are such that from a public health point of view they are in nowise comparable to milk (R. 1094-95, R. 1171-73). This fact is also established in the record by the statement of the plaintiff's leading witness, Dr. John B. Sanborn:

*"... milk is the most perishable and easily contaminated food that is placed in paper containers ..."* (R. 1495).

\* The trial court did not point out that the sale in paper containers of such of these commodities as are milk products is forbidden by the Chicago Board of Health. The only evidence of the sale of milk in paper containers was testimony that attorneys employed by the plaintiff went to several drug stores and restaurants in Chicago and purchased milk in paper tumblers (R. 857-62, 891, 897). The clerks in these stores were violating a regulation of the Board of Health providing, "All milk and milk products shall be sold, served, or dispensed to the final consumer only in unopened, original containers as received from the distributor" (defendants' exhibit 26, R. 1697). Obviously a violation of this regulation does not show that there are no health hazards in the use of paper milk containers.

**Proposal by Chicago Board of Health that City Council permit use of paper milk containers.**

The majority opinion of the Circuit Court of Appeals emphasizes the fact that the Chicago Board of Health recommended to the Chicago City Council that the ordinance be changed in accordance with the amendment to the model ordinance of the United States Public Health Service. The proposal was made on October 16, 1939 while this case was being heard by the master. In making its recommendation for the change in the ordinance, the Chicago Board of Health also recommended that the regulations of the United States Public Health Service be adopted (R. 1698-99). As we have noted, the regulations of the Health Service require health officials to inspect paper milk containers while in the process of manufacture and this inspection must be made in far-distant places. Clearly it is not unreasonable on the part of the Chicago City Council to disregard the recommendation of the Board of Health that paper milk containers be permitted when the regulations of the containers recommended by the Board would require the local health officers to make expensive inspection trips to the paper mills and converting plants.

\*     \*     \*     \*     \*

We submit that the factors considered by the trial court and the majority of the judges of the Circuit Court of Appeals to prove the ordinance to be unreasonable are not determinative of the question of the validity of the ordinance under the fourteenth amendment. Unless the wisdom and propriety of the ordinance are to be determined by the courts, the controlling factor is what was admitted in the majority opinion of the Circuit Court of Appeals: "the record discloses some evidence . . . that the use of such

containers presents a hazard to health" (R. 1794). In view of the findings of the master and this admission by the Circuit Court of Appeals, we have not discussed in detail the evidence showing these hazards, but we call particular attention to the master's discussion of the evidence about the characteristics of paper milk containers (R. 1718-29).

The prohibition of the use of paper milk containers may be held unreasonable only if it is "so unrelated in any way to any possible danger to public health that the enactment must be considered as a merely arbitrary interference with the property and liberty of the citizens" [*People v. Quality Provision Co.*, 367 Ill. 610, 614 (1938), quoting from Mr. Justice Hughes in *Price v. Hinois*, 238 U. S. 446, 451-452 (1915)]. The evidence shows that the ordinance is not unreasonable. The holding of the trial court and the pronouncement of the Circuit Court of Appeals that the ordinance is unreasonable were based on an erroneous conception of the applicable principles of constitutional law.

**CONCLUSION.**

"The defendants (petitioners) respectfully urge this court to review and reverse the judgment of the Circuit Court of Appeals.

CITY OF CHICAGO, a *Municipal Corporation*,  
BOARD OF HEALTH OF THE CITY OF CHICAGO,  
DR. ROBERT A. BLACK, *Health Commissioner and Acting President of Board of Health of the City of Chicago*,  
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